Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

THOMAS A. DOLAN,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 24, 2008

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QUESTION PRESENTED FOR REVIEW

Did not the United States Courts of Appeals for the Sixth Circuit err in holding that Mr. Dolan's claims are barred by the applicable statute of limitations by virtue of ineffective service of process?

RULE 14.1[b] STATEMENT

A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner:
Thomas A. Dolan

Defendant-Appellees and Respondents:
United States of America
Guy Blackwell
Randall Kizer

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED BY THE COURTS

The Opinion of the United States Court of Appeals for the Sixth Circuit dated January 28, 2008 (an Opinion by Circuit Judges Rogers and Sutton and District Judge Bertelsman, sitting by designation) was recommended for full-text publication and is reported at 514 F.3d 587 (6th Cir. 2008).

The Order granting the defendant/respondents' motion to dismiss or in the alternative for summary judgment in the United States District Court for the Eastern District of Tennessee, docket number 3:06-cv-00208 was dated March 13, 2007. It is unreported. That decision is to be found at 2007 WL 784351 (E.D. Tenn. 2007) and at 2007 U.S. Dist. LEXIS 18893 (E.D. Tenn. 2007).

CONCISE STATEMENT OF THE BASIS FOR UNITED STATES SUPREME COURT JURISDICTION

This is a direct appeal from a result obtained in a United States Court of Appeals. The Sixth's Circuit's Opinion is dated January 28, 2008. Consequently, the United States Supreme Court has jurisdiction by virtue of 28 USC § 1254.

STATUTES AND REGULATIONS INVOLVED IN THE CASE, *verbatim*

Rule 3, Tennessee Rules of Civil Procedure: COMMENCEMENT OF ACTION.

All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 90 days or is not served within 90 days of issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year of the filing of the complaint.

Rule 4.04[10], Tennessee Rules of Civil Procedure: PROCESS.

Service by mail of a summons and complaint upon a defendant may be made by the plaintiff, the plaintiff's attorney or by any person authorized by statute. After the complaint is filed, the clerk shall, upon request, furnish the original summons, a certified copy thereof and a copy of the filed complaint to the plaintiff, the plaintiff's attorney or other authorized person for service by mail. Such person shall send, postage prepaid, a certified copy of the

summons and a copy of the complaint by registered return receipt or certified return receipt mail to the defendant. If the defendant to be served is an individual or entity covered by subparagraph (2), (3), (4), (5), (6), (7), (8), or (9) of this rule, the return receipt mail shall be addressed to an individual specified in the applicable subparagraph. The original summons shall be used for return of service of process pursuant to Rule 4.03[2]. Service by mail shall not be the basis for the entry of a judgment by default unless the record contains a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute. If service by mail is unsuccessful, it may be tried again or other methods authorized by these rules or by statute may be used.

CONCISE STATEMENT OF THE CASE

On May 26, 2005, Mr. Dolan filed suit in the United States District Court for the Middle District of Tennessee, well within the one-year statute of limitations, which would have expired on May 28, 2005. As to the United States of America and defendants Kizer and Blackwell, his suit was predicated on 42 USC § 1983. On February 13, 2006, the Middle District dismissed the case without prejudice on venue grounds. On June 2, 2006, Mr. Dolan re-filed his lawsuit in the United States District Court for the Eastern District of Tennessee. On June 7, 2006, summonses were issued as to Kizer, Blackwell, and the United States of America. There is no question of the efficacy of service on the United States. Both Blackwell (an Assistant United States

Attorney) and Kizer (a Special Agent of the FBI) were served by Certified Mail, Return Receipt Requested at the USDOJ office address in Knoxville, Tennessee. The returns of service were signed for by an employee of the United States Attorney's Office who is not a party to these proceedings. THERE IS NO QUESTION BUT THAT BOTH KIZER AND BLACKWELL RECEIVED THE SUMMONSES AND COMPLAINTS, AND NO QUESTION BUT THAT BOTH HAD ACTUAL NOTICE OF THE PROCEEDINGS AND THE COMPLAINT. IN THIS CASE THERE IS NO ASSERTION OR ISSUE OF PREJUDICE. These things occurred on June 27, 2006. On August 21, 2006 the scope of employment of both Kizer and Blackwell was certified by the Department of Justice, and on that same day The United States, Kizer, and Blackwell for motions to dismiss or in the alternative for summary judgment. By Order dated March 13, 2007, the United States District Court for the Eastern District of Tennessee granted the motions to dismiss, holding, *inter alia,* that Kizer and Blackwell had not been correctly served. Mr. Dolan appealed, and by written opinion decided and filed January 28, 2008, the United States Court of Appeals for the Sixth Circuit affirmed.

REASONS FOR GRANTING THE PETITION AND ARGUMENT

Rule 10[a] of the Rules of the United States Supreme Court speaks to cases where a United States Court of Appeals "...has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power...". That is precisely what has happened here.

Mr. Dolan finds his claims dismissed on statute of limitations grounds because the summonses that were served on Mr. Kizer and Mr. Blackwell were not served on them at their respective home addresses. Inexplicably, the Sixth Circuit reached this result by relying on an unreported District Court case, *v. Hess,* 2006 WL 2370205, 2006 U.S. Dist. LEXIS 57963 (E.D. Tenn. 2006). A review of that case reveals the counterintuitive holding that "...actual knowledge and lack of prejudice cannot take the place of legally sufficient service." The citation for that proposition is *LSJ Inv. Co. v. O.L.D., Inc.,* 167 F.3d 320 (6th Cir. 1999). Even the most cursory review of *LSJ* reveals that it is readily distinguishable from the case at bar on its facts. In *LSJ,* the principal issue involved a defendant who, both the District Court and the Sixth Circuit observed, may well have been actively evading service; here, the issue which was deemed dispositive in the courts below is wholly unrelated to any such thing. Moreover, the *LSJ* panel correctly observed (at 167 F.3d 323) that service of process must comport with due process by providing notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to "...present their objections." THAT IS PRECISELY WHAT HAPPENED HERE.

The situation that is the subject of this Petition is further complicated by U.S. District Judge Phillips' express – indeed virtually exclusive - reliance on *Ecclesiastical Order of the Ism of Am v. Chasin,* 845 F.2d 113 (6th Cir. 1988). That case is, if anything, less apposite than the cases cited hereinabove. In *Chasin,* the was no effort to serve the individual defendants;

process was had only on the Department of Justice. Here, as noted, the is no dispute that Kizer and Blackwell were actually served.

CONCLUSION

As articulated, the results obtained in both the District Court and the Sixth Circuit were predicated on inapposite case law. No case relied upon by either the trial court or the appellate tribunal stands for any proposition that could result in dismissal of Mr. Dolan's claims on limitation grounds. This is a circumstance that can fairly be said to define a far departure from the accepted and usual course of judicial proceedings. Thomas A. Dolan earnestly petitions this court for the issuance of the writ of *certiorari*. By no other method can the harsh and unlawful result below be rectified.

Respectfully submitted,

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